Nagji Vallabhaji and Co. Vs. Meghji Vijpar and Co. and ors.

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Court : Mumbai

Decided On : Mar-31-1983

Reported in : 1983(2)BomCR140

Judge : R.D. Tulpule, J.

Acts : Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 - Sections 4(4); Transfer of Property Act, 1882 - Sections 106 and 107

Appeal No. : First Appeal No. 524 of 1979

Appellant : Nagji Vallabhaji and Co.

Respondent : Meghji Vijpar and Co. and ors.

Advocate for Def. : V.O. Meghani and ;V.L. Panjwani, Advs. for respondent Nos. 1 and 2

Advocate for Pet/Ap. : H.G. Advani and ;Pravinchand Shah, Advs.

Judgement :

R.D. Tulpule, J.

1. This is an appeal against the judgment and decree passed by the Judge, City Civil Court in S.C. Suit No. 8109 of 1972. The suit and the appeal which would ordinarily appear to be raising a simple controversy as between a landlord and tenant has assumed considerable proportion and magnitude.

2. The appellants are the original defendants---M/s. Nagji Vallabhji and Co. The first plaintiff is a firm 'M/s. Meghji Vijpar and Co., which was a tenant of Bay No. 4 in Fully Compartment' 'I' i.e. godown No. 4, which is situated at Rayon Grain Market at Dana Bunder. The dispute relates to Gala No. 4 in the said godown.

3. Stated briefly the case of the plaintiff was that the plaintiff firm which was initially only M/s. Meghji Vijpar and Co. alone were the tenants of the said premises, having taken the premises from the trustees of the Port of Bombay. That the defendants for some years in the part were in occupation of this godown No. 4 under written agreement from time to time, which was every time for one year commencing from Kartak Shudh 1 to Asho Vad 30 according to Samvat calendar. Last such agreement was executed on 7th November, 1970 and was to expire on 19th October, 1971, having commenced from 31st October, 1970 equivalent to Samvat year 2027.

4. As the plaintiff firm did not wish the defendant to continue in the occupation of the

premises, they served a native through their Advocate on 13th January, 1972, as efforts to obtain possession of the premises after expiry of the term were unsuccessful. That notice, the defendant replied to on 14th, January, 1972 and raised a contention that they were not liable to handover possession of the premises after the expiry of period on 19th October, 1971 and contended that they were lawful sub-tenants of the plaintiff-firm. In order to avoid controversy, the plaintiff-firm by its letter dated 3rd February, 1972 accepted 'the defendant's sub-tenancy' and contended that the subtenancy even if it existed is terminated firstly by efflux of time and alternatively by a notice to quit on 13th January, 1972. The plaintiff then proceeded to say that for the purpose of the suit 'the plaintiffs unconditionally admit that the defendants were the monthly sub-tenants of the plaintiffs prior to the expiry of the period mentioned in the said writing dated 7th November, 1970', and that no notice was necessary and even if notice was necessary the said sub-tenancy was terminated by a notice issued on 13th January, 1972. The plaintiff also stated that the allegation of the defendants that they were in possession since 1957 is false. The provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as the 'Bombay Rent Act') did not apply to the tenancy of the premises and that the suit was filed on the basis that the defendants were monthly tenants, in respect of the premises whose tenancy has been duly and lawfully terminated. The plaintiffs once again repeated that the said monthly tenancy came to an end on Asho Vad 30th of S.Y. 2027 and also by the notice given by them on 13th January, 1972. There were other claims also such as relating to the rent etc., which for the purpose of this appeal are not relevant.

5. The plaintiffs relied upon the correspondence which passed between the parties prior to the suit and the last writing dated 7th November, 1970. It would be convenient firstly to refer to the notice dated 13th January, 1972 and the reply dated 14th January, 1972. The contention taken by the plaintiffs in their notice dated 13th January, 1972 was that the defendants were allowed under an agreement the use and occupation of the premises for Samvat year 2027 in writing and that possession was not handed over wrongfully. In their reply the defendants stated that they were 'in exclusive use, enjoyment and possession of the said Gala No. 4 as lawful sub-tenants of your clients from 1957'. This notice is addressed by the Advocate on behalf of the firm M/s. Meghji Vijpar & Co. The reply dated 14th January, 1972 is also addressed to the advocate on behalf of the firm Meghji Vijpar & Co.

6. In the written statement, however, the plaintiffs shifted their stand from their notice dated 13th January, 1972. The defendants also shifted their stand from one taken in their reply dated 14th January, 1972. While the plaintiffs conceded that the defendants were sub-tenants, as contended, of the firm Meghji Vijpar & Co., the defendants in their written statement contended that 'one Kanji Vijpar and Meghji Vijpar were joint tenants in respect of the suit premises and said Kanji Vijpar was no more a partner of the firm Messrs. Meghji Vijpar and Co. and were sub-lessees even prior to 21st May, 1959 by which under the Bombay Rent Act the sub-tenants were protected'. Further contention which was taken with regard to sub-tenancy was that the sub-tenancy was from year to year and for indefinite period. The plaintiffs used to obtain and the defendants used to give writings from time to time 'purporting to be storage agreements'. These were sought on the ground that the said writings were required by the plaintiffs for the protection of the plaintiffs themselves against the Bombay Port Trust, but that the real nature of the transaction between the parties was one of lawful sub-tenancy. The defendants were in exclusive use, enjoyment and possession of the premises for a consideration of paying agreed rent, which they were

paying. No services were rendered by the plaintiffs to the defendants and therefore, there was no such expiry of period on 19th October, 1971. The agreement did not represent the true relationship between the parties.

7. It will, thus, be seen that there is slight shift in the case of the defendants and the plaintiffs. The plaintiffs accepted that the defendants were sub-tenants of the plaintiffs, as contended, but did not in specific terms say that the defendants were sub-tenants from 1957, which was the contention set up. This aspect of the matter assumes some importance in the present case. I have set out the correspondence and the pleadings of the parties to some extent in detail.

8. The controversy in the Court below and in this Court also centred firstly around the question of applicability of the Bombay Rent Act to the premises in question. Though oral evidence was led by the parties in the contention raised and issues involved, that oral evidence is of little consequence to the determination of the question and issues.

9. The first contention which was raised on behalf of the defendants in the Court below as well as here was that the defendants having been let into the premises prior to 22nd March, 1959 were protected lawful sub-tenants to whom the provisions of the Bombay Rent Act will apply. On the other hand the contention of the plaintiffs was that though the plaintiffs were tenants and had sub-leased godown No. 4 to the defendants firm nevertheless the premises being of the Bombay Port Trust as the godown and the land belonged to the Bombay Port Trust, there is not question of the Bombay Rent Act becoming applicable. The premises fall according to the defendants within the exemption carved out in section 4, sub-section 4(a) of the Bombay Rent Act while it was the plaintiffs' contention that the premises were exempted from the operation of the Bombay Rent Act in terms of section 4 sub-section (1). As I have stated there is considerable controversy which was raised on this issue.

10. There is no dispute, nor can there be any dispute that section 4(1) exempts the premises belonging to the Government or a local authority from the operation of the Bombay Rent Act. The definition of the premises as defined in the Bombay Rent Act means (a) any land not being used for agricultural purposes and (b) any building or part of a building let or given on licence separately, and as extensively defined in section 5(b). The contention, therefore, advanced by the plaintiff clearly was that this being a building belonging to the Port Trust, it was covered by section 4(1) of the Bombay Rent Act.

11. Section 4 has a sub-section 4(a). That sub-section was introduced as consequence of the decision of the Supreme Court in Bhatia Co. operative Housing Society Ltd. v. D.C. Patel : [1953]4SCR185 , equivalent to 55 Bom. L.R. 199.

12. The question, therefore, for consideration is whether the provision of section 4(4) (a) carved an exemption from the amplitude of the provisions of section 4 sub-section (1), and which is attracted to the premises in question, These premises are not land. They are building or part of a building. The learned Counsel for the appellant Shri Advani contended that sub-section 4(a) of section 4 exempts buildings. It does not speak of relationship. Therefore, the argument proceeded that if it was a building deemed to have been or belonging to a local authority or the Government, the sub-lease thereof could be created. As between such tenants and sub-tenants, the relationship would be governed by the Bombay Rent Act. The learned Counsel submitted that it was not necessary to investigate and enquire, nor any question

arose in such a contingency as to whether the premises or building was constructed upon 'land held by any person' upon which under a contract or an agreement such person erected a building and the building under the agreement shall belong to the local authority or the Government. He contended that the question before the Court was not what would govern the relationship between the local authority or the Port Trust, in this case and the plaintiff-firm. He urged that the thrust of section 4 sub-section 4(a) was to protect sub-leases holding from tenants of buildings erected or belonging to the State Government or local authority. It was not necessary to investigate in such a case according to him, where the suit was between such a tenant and sub-tenant or lesses, as to in which circumstances the building was erected.

13. The first case in which this question was first raised was Ram Bhagwandas v. Municipal Corporation of the City of Bombay A.I.R. 1958 Bombay 364 in which the question of applicability of sub-section 4(a) of section 4 was considered. This Court observed that the proper interpretation to put upon section 4(4)(a) is the expression that 'under an agreement, lease or grant' must qualify both 'building erected' and 'land held'. In other words, the building is erected by the lessee pursuant to the agreement, lease or grant given to the person who holds the land under that agreement'. It was pointed out that the use of the words 'such agreement' and 'so erected' clearly suggest that the building is erected under an agreement and pursuant to the agreement. Therefore, where a building is erected by the lessee, not pursuant to any agreement with the Municipality or not under any agreement with the Municipality, then the case does not fall under section 4(4)(a). It was also pointed out in that case that the wording of section 4(4)(a) is very unsatisfactory and causes difficulties while interpreting this section. It also referred to the history of the introduction of the sub-section. It holds that 'the protection attaches to the premises and the question must always be whether at the relevant date the protection given under the Rent Act attaches to the premises in question' or otherwise. In other words, therefore, it was held that sub-section 4(a) of section 4 exempts buildings which are entitled to a particular qualification. That qualification was that the building must have been erected under an agreement, lease or grant, and must have been erected on such land held by a person from the local authority or the Government as the case may be under and agreement, lease or grant. Therefore, there must be dual qualification with regard to the building. It must be on land held under an agreement and erected under the agreement. To such a building where such qualification is attracted then even though the building is to belong to the Government or local authority that would not come in the way of the application of the Rent Act, to such buildings. Therefore, to tenants and sub-tenants in such buildings, the Rent Act will apply. It follows that if the building does not qualify for such description the Rent Act will not apply.

14. In the present case no such evidence has been led and there is nothing to show that the parties have joined issue on the question as to whether the present building qualified for the purpose of exemption under section 4(4)(a).

15. The view taken by the Division Bench of this Court in Ram Bhagwandas's case was approved and upheld by the Supreme Court in Kanji Manji v. The Trustees of the Port of Bombay, reported in 65 Bom.L.R. 258. At the same time, Advani, learned Counsel for the appellants placed and emphasis and relied on certain observations in this decision to which I shall presently come. That was a suit between the trustees of the Port of Bombay and assignees of the lease from the Port Trust, Kanji Manji and

one Rupji. The Supreme Court had found in that case that the lessees who had taken these premises on 11th August, 1943 were M/s. Dinshaw Rustom and Company who had taken a lease as monthly tenants of the land together with the building thereon. Certain terms of the lease show clearly that the buildings belonged to the Port Trust. After referring to the unsatisfactory draftmanship of sub-section 4(a) of section 4, the Supreme Court pointed out that the amendment achieved two different things, firstly, it enables the lessee of a particular kind of building described in Clause (a) to create sub-tenancies inspite of the ban against sub-tenants contained in section 15, and secondly, it excluded from the operation of sub-section (1) such buildings described in Clause (a). It also pointed out that sub-section dealt with the buildings and not with land and the Legislature did not use the general word 'premises', so that the operation of sub-section 4(a) of section 4 was confined to only buildings. It did not also refer to the relationship. It then referred to the decision in Ram Bhagwandas's case and pointed out that the meaning given to the sub-section in Ram Bhagwandas's case was the 'only possible meaning, regard being had to the circumstances in which this sub-section came to be enacted'. The effect of the amendment was stated to be that it cut down the operation of the words 'any premises belonging to the Government or a local authority'. The result of the amendment in the words of the Supreme Court was thus 'if a Government or a local authority wants to evict a person from the land, the provisions of the Rent Control Act, do not come in the way'. Such a suit is not required to be filed in the Small Causes Court as required by the Rent Act but in the City Civil Court.

16. In Kanji Manji's case the building did not qualify for the description of building 'constructed under an agreement' but 'as buildings belonging to the Government'. An agreement was advanced in Kanji Manji's case that the decree could not be performed by the appellants, because as between Kanji Manji and his sub-tenants the provisions of the Rent Control Act would apply and he would not be able to evict them. The learned Counsel for the appellant relied heavily upon this argument and pointed out that the Supreme Court did not proceed to consider this question and left it open. He referred to the following statement in the case' whether or not the Port trust authorities would be able hereafter to evict the sub-tenants of the appellant is a matter, on which we need not express any opinion'. If the appellant cannot evict his sub-tenants so as to be able to remove the buildings, in exercise of the right conferred on him, that is an unfortunate circumstance, which does not serve to entitle him to defeat the rights of the Port Trust authorities. They are on claiming vacant possession of the site.....'

17. Mr. Advani, therefore, contended that though as between the Port Trust and the present plaintiffs, there may be no defence to a suit for possession and such a suit would not be governed by the Rent Act, the Supreme Court has left the question open and clearly be implication allowed the operation of the provisions of the Bombay Rent Act as between the tenant and his sub-tenants. It was urged that it governs not only the building but the relationship between the lessee of such a building and his sub-lessee. His contention, therefore, was that if action was brought by a lessee of a building belonging to a local authority against his sub-lessee, then the provisions of the Bombay Rent Act apply notwithstanding that as between the lessee or tenant and the Port Trust the Act will not apply. His contention was that the obvious intent of the amendment was to protect sub-tenants of a tenant who would acquire possession of the building erected on Port Trust an or belonging to the Port Trust, they are not liable to be evicted because of the application of the Rent Act to such building. His contention was that though the legislature wanted the Act to be inapplicable between

the local authority or the Government and its tenant or lessee, it did not want the Act to be inapplicable as between the tenant landlord and his sub-lessee. The result is achieved according to him by the amendment to section 4 by introduction of section 4(a).

18. Mr. Advani, though he did not rely upon any decisions, pointed out to me two other decisions. The first is of the Division Bench consisting of Patel And Chitale, JJ., in (Appeal No. 336 of 1960 rendered by Patel, J, on 23rd September, 1967) and the other reported in (The President, Swami Vivekanand Ashram v. Kolhapur Sports Association Ltd. 65 Bom.L.R. 18. This has been referred to in the Division Bench judgment earlier referred. Curiously, neither of these decisions refer to Ram Bhagwandas's case. In Appeal No. 336 of 1960 the dispute was between a lessee and sub-lessee in respect of the premises belonging to the Port Trust. The facts stated in that case would indicate that the lessees, who was an assignee, had erected a building in question in terms of the lease which lease subsequently came to be assigned to the plaintiff. The appellant-defendants were tenants of such building and their tenancy was terminated, the suit was filed for possession in the City Civil Court, Bombay. The appeal succeeded and it was held that the case was covered by the exemption given in section 4 sub-section (4)(a). The Division Bench observed 'that sub-section 4(a) makes it abundantly clear that if a building is erected by the lessee of the land then not withstanding any terms in the agreement of lease or the lease itself of the grant that the building erected would belong to the Government or the local authority, the Rent Restriction Act would apply'. It found that the lessees had to construct in accordance with the terms of the building plan approved and though there were restrictions 'the building continued to be the building of the lessees'. It will therefore, be seen that the facts in Kishorchandra and Co.- the appellant in Appeal No. 336 of 1960 are entirely different than the facts which appear in our present case. It is not possible to think that Kishorchandra and Co.'s case is of any assistance to Mr. Advani. Same must be stated in regard to judgment in 65 Bom.L.R. 18. It must, however, be said that Mr. Advani did not rely upon them to support his contention.

19. Mr. Advani, however, strongly relied on the decision of Mr. Tarkunde, J. in Josephy Santa Vincent v. Ambico Industries 70 Bom.L.R . 224. That case was based on similar facts. According to him, therefore, I should either follow the ratio followed in that case, or in case I did not agree with the view expressed by the learned Judge, the matter should be referred to a larger Bench. If I were to take the view that the facts in Josephy's case were indistinguishable from the present case, or that the question as to the applicability to the premises in question in that case of section 4(4)(a) was decided, that course would have been necessary to follow. As I shall presently point out, in my opinion, the question as to whether in the circumstance section 4(4)(a) applies or not was not considered. Its application was assumed.

20. The facts in that case were that the Port Trust had an extensive estate known as Ballard Estate of which the godown in suit was a part. It is not clear from the statement of facts as to whether the entire estate or the godown was leased by the Port Trust as to the first respondent Ambico Industries. The first respondent had let out the godown to M/s. William Jacks and Company Limited. In January 1957 Josephy got possession of this godown from M/s. William Jacks and Company Limited the second respondent. William Jacks and Company surrendered their tenancy in favour of M/s. Ambico Industries in 1959. In April 1960 M/s Ambico Industries filed a suit against William Jacks and Company for possession of the godown. Josephy was not

made a party to that suit. An ex parte decree was obtained by Ambico Industries. In execution of that decree, obstruction was given by Josephy, who was petitioner before this Court. As the obstruction was directed to be vacated, Josephy filed a suit in the Small Clauses Court for declaration of his tenancy rights. That suit came to be dismissed by the trial Court on the ground that the sub-lease to Josephy was not valid according to sub-section (2) to section 15 and, therefore, section 14 had no operation. The trial Court had also held that the property belonged to the Bombay Port Trust and M/s Ambico Industries were tenants of the godown while William Jacks and Company Ltd. were sub-tenants. Relying on the decision in Balkrishna Maruti Devgaonkar v. Saidanna Sayanna 65 Bom.L.R. 149 it was held that a sub-tenant was not protected by the Rent Act. This decree was affirmed by the Appellate Bench of the Small Causes Court against which Josephy preferred a petition in this Court.

21. The argument which was advanced on behalf of the petitioner Josephy was that the second respondent viz. William Jacks and Company Limited were lawful sub-tenants of M/s. Ambico Industries as Clause (b) of sub-section (4) of section 4 permits sub-leases in respect of buildings belonging to the local authority. The assumption underlying therein clearly was that was a building to which sub-section 4(a) applied. The Court did not express any opinion or consider whether the building in question was one to which section 4(4)(a) was attracted or otherwise, and its application seems to have been assumed. It was argued that 'Since the premises in the present case belong to the Bombay Port Trust, it follows from the above provisions that the first respondent, who hold the premises from the Port Trust, were not precluded by section 15, as it stood before the amendment from sub-letting the premises to the second respondents. The second respondents were thus the lawful sub-tenant of the premises when they sub-let them to the petitioner.' It was also argued that the word 'tenant' in section 15 includes a contractual sub-tenant and, therefore, section 14 operated. In the course of the entire judgment, which I have carefully gone through, the question whether the premises in question, or the building was one to which sub-section 4(a) of section 4 will apply or not was not examined or decided. It was assumed, and in view of the provisions of sub-section 4(b) a sub-tenant's sub-tenant was found to be entitled to the protection of the Act in view of the determination of the intervening estate of sub-tenant by reason of section 14.

22. It would be useful to refer to sub-clause (b) of sub-section (4) of section 4 of the Rent Act at this stage. It enables creation of sub-tenancy notwithstanding the provisions of sub-section (2) of section 15 to 'such person'. This was permitted as before or after the commencement of the Ordinance to the Rent Control Act issued on 22nd May, 1959. The reference in sub-clause (b) to

'such person' and to 'such building' harks back to the provisions of sub-section (4)(a). Therefore, it is only in respect of the buildings which qualified for the exemption from section 4 as described in sub-section 4(a) that sub-section 4(b) would be attracted. As I have pointed out, Josephy's case did not decide this question. It did not hold that the building in question was covered by the explanation in sub-section 4(a), but assumed that it was so and proceeded on that hypothesis. Josephy's case, therefore, in my opinion is no authority for the proposition that as between the lessees of the building belonging to the Port Trust or local authority and his sub-lessee, the protection of the Rent Act would be available. In that view of the matter, it must be held that the defendant in this case is not entitled to the protection of the Rent Act and the suit was maintainable in the City Civil Court.

23. During the course of the arguments in this appeal when I indicated my above view with regard to the principal contention urged, the learned Counsel for the appellant wished to urge the other points in the appeal. Counsel, therefore, were heard on the other issues raised. Amongst other issues framed, the suit was sought to be defeated on several grounds such as the plaintiff-firm not being registered under the Indian Partnership Act; non-joinder of Kanji Vijpar was fatal to the suit; that the sub-tenancy of the defendant had not been brought to an end and also the question whether the sub-tenancy was from year to year or otherwise. The latter question as to whether the sub-tenancy was from year to year is undoubtedly connected with the question of proper termination of the lease or sub-tenancy or otherwise.

24. The resolution of these issues presented some difficulty in the absence of proper consideration of the questions which were raised in this appeal, and those which arose on the pleadings of the parties. These are reflected not wholly by issues Nos. 4 to 7 before the trial Court. The learned Judge held that the suit was against a trespasser and, therefore, could be filed by one of the co-owners viz. Meghji Vijpar. He held that there was no question of any registration of partnership firm since this is a suit on title, and was not for enforcement of any contract, to which the Indian Partnership Act was attracted. As he held that the sub-tenancy was for a term, which expired on 19th October, 1971, no question of determination of tenancy arose and the plaintiffs were entitled to possession. It may be mentioned that after the institution of the suit which was originally filed in the name of the firm M/s. Meghji Vijpar and Co., the plaint came to be amended and plaintiffs Nos. 2 to 7 joined as plaintiffs to the suit. Plaintiff No. 2 is Meghji Vijpar, while plaintiffs Nos. 3 to 7 are the heirs of deceased Ratansi partner of the firm Meghji Vijpar and Co. Initially consisted of two partners Meghji Vijpar and Kanji Vajpar. That Kanji Vijpar retired from the partnership in the year 1963 and Meghji and Ratansi continued as its partners. Ratansi also died and now the dissolved partnership business was owned by the sole proprietor Meghji. According to the terms and conditions of dissolution the property in suit had come to the share of Meghji alone, and therefore, he was entitled to sue. I do not purpose to refer to yet one more contention which was argued in the Court below i.e. the bar of section 212 of the Succession Act.

25. In regard to these matters what was urged in this Court for the appellant was that the learned Judge was not right in holding that the subtenancy had come to an end by efflux of time on 19th October, 1971. It was urged that it was common ground between the parties that the annual agreements executed between them did not reflect the real transaction. The plaintiffs had admitted that the defendants were sub-tenants. They must deem to have admitted that they were sub-tenants right from the beginning viz. 1957. The character of the sub-tenancy was not determined by the learned Judge. He seems to have assumed that it was for a fixed period, which in the circumstances Mr. Advani contended was erroneous. It was then urged that this sub-tenancy according to the defendants contention was created by two persons Kanji Vijpar and Meghji Vijpar and not by the firm Meghji Vijpar and Co. He contended that there was nothing to indicate that this lease-hold interest of Kanji Vijpar and Meghji Vijpar had become the property of the firm when it was initially obtained on sub-lease by the defendants. Though, Mr. Advani conceded that later documents produced on record went to suggest that the godown in question was property of the partnership firm of the partners dealing with it, still he submitted that what is necessary to be found is that with whom the contract of sub-tenancy was and who were the lessors of the defendants. If the lessors were two persons Meghji and Kanji, then the sub-tenancy of the lessee could be brought to an end by them only. He submitted,

therefore, that Kanji Vijpar was necessary party to the suit. It was also necessary that Kanji should have joined in terminating the tenancy of the defendants. Termination of the defendants' sub-tenancy by the firm Meghji Vijpar and Co. was not good and effective. The sub-tenancy did not come to an end by efflux of time and had to be terminated.

26. Mr. Meghani appearing for the respondents submitted that the transaction between the parties was that of a lease. It was transfer of interest to which Transfer of Property Act will apply. No considerations of the Contract Act and the provisions of the Contract Act will be applicable. He submitted that the last of such lease expired on 19th October, 1971. No notice, therefore, was necessary as the case did not fall within section 111(h) of the Transfer of Property Act. The lessors were the firm M/s Meghji Vijpar and Co. There was, therefore no question of Kanji Vijpar joining either in the notice to quit or the suit. He pointed out that the Court is entitled to take into account the subsequent happenings or the events .That in this case it was established clearly that Meghji Vijpar had become entitled to premises-godown No. 4. Whatever may have been the tenancy rights of the defendants those had long back come to an end the decree could be passed for possession on the basis of the subsequent events in the present case. Notion of the Contract Act, according to him, could not be imported in cases of Transfer of Property and Contact Act was applicable only in cases where contracts relating to the property were executory, and not where they executed and the transfer was complete.

27. It is clear that some of these basic questions were not either raised before the learned Judge of the City Civil Court or it did not choose to answer them and proceed to construe the last agreement dated 19th November, 1970 as a sub-lease for a term executed by the defendants in favour of the plaintiff-firm. If that finding is correct and if that is the case made out by the parties in their pleadings then the rest of the judgment follows as a matter of course. The learned Judge, however, did not stop the consider, even assuming that the documents of 19th November, 1970 was the last sub-lease, what would be the effect in law of the document and what kind of relationship was created by that documents. For the reason which will presently appear, its seem to me that learned Judge feel into an error in construing that documents has a sub-lease for a fixed team.

28. Leaving aside for the time being the contention raised by the defendants let the documents executed between the parties from time to time from 1957 did not reflect the real nature of the transaction, the suit document upon which reliance was placed is Exh. 'F'. Clause 6 of that agreement says that it is bending on both the parties from 31st October, 1970 to 19th October, 1971 and the charges were to be paid at Rs. 680/- per month and a deposit was agreed of Rs. 1360/-. That these agreements are consistent, uniform and in line with the previous agreements is not disputed between the parties. Three earlier agreements for the year 1957-58, 1958-59 and 1959-60 are produced at Exhibit 1, while one which is for the year 1961-62 is produced at Exh. 4. Exh. 4. and Exh. F are almost identical while Exh. 1 refers to annual rent payable in four instalments. The first of these dated 24th October, 1957 specifically refers to annual rent or charges being reserved in a sum of Rs. 5155/-. It is a settled position in law that the mode of payment of rent is only a circumstance. That rent is paid monthly would not be determinative of the character of the transaction. The transaction has to be construed as a whole.

29. As to what was the transaction and what was agreed between the parties, both

the plaintiff and defendant having changed their respective initial positions and the defendants having further changed their position, in the absence of any inquiry into that aspect of the matter, is difficult to find. I have already pointed out that the plaintiffs alleged their notice dated 13th January, 1972 what the defendants stated in their reply dated 14th January, 1972. So far as the contention about sub-tenancy is concerned, the contention of the defendants was accepted by the plaintiffs in their notice dated 3rd February, 1972. 14th January, 1972 reply stated that 'the defendants were lawful sub-tenants from 1957', It refrained from saying as to whether they were annual sub-tenants or sub-tenants from year to year or they were monthly sub-tenants. The plaintiffs accepted this contention in their reply and also in the plaint. The reply says 'Contentions about the nature of relationship in question in respect of the said premises' were accepted and that the defendants were treated as their 'sub-tenant as considered'. It must be, therefore, held that the plaintiffs accepted the defendants as their sub-tenants from 1957. In the plaint portion, to which I have already made a reference and extracted, the plaintiffs 'unconditionally admitted that the defendants were monthly sub-tenants of the plaintiffs'. They qualified, however, that position by saying that they were such monthly sub-tenants prior to the expiry of the period mentioned in the document dated 7th November, 1970. In other words, the story of the plaintiffs in the plaint was that the defendants were monthly sub-tenants though they did not choose to say from when they were monthly sub-tenants and say that they continued only upto 19th October, 1971 when the sub-tenancy expired on account of efflux of time.

30. The defendants' case on the other hand as I have already observed also underwent a change. It firstly stated that the lessors were two individuals viz. Kanji and Meghji. Secondly it stated that the sub-tenancy was 'from year to year for indefinite period' commencing from the year 1957. In other words, the defendants' case in their pleadings was that they were lawful sub-tenants from the year 1957 and held that sub-tenancy from year to year from Kanji and Meghji.

31. It is firstly necessary in this context to refer to the provisions of section 107 and 106 of the Transfer of Property Act. Section 107 which is relevant in this case, excluding proviso is in these terms :

'107:---A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.Where a lease of immoveable property is made by a registered instrument, such instrument or, where these are more instruments than one, each such instrument shall be executed by both the lessor and the lessee.'

It will thus be seen from the construction of section 107, that lease from year to year or reserving an annual rent can be made by a registered instrument; while other leases may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. If the contention, therefore, of the defendants that the lease was from year to year and was for indefinite period, is to be accepted, than it can only be accepted if the lease under section 107 part one was a registered lease, the alleged documents of licence in this case do not admittedly create a lease, though that apparently was the real intention between the parties. Assuming the first document of the year 1957 creates a lease, though it may not be from year to year, it

reserved an yearly rent. Therefore, in either view of the matter taking the plaintiffs' case or the defendants' case, it is quite clear that when the tenancy in this case commenced in the year 1957, it did not comply with the provisions of section 107 and was not made by a registered instrument. I have already pointed out that the plaintiffs must be deemed to have admitted, which they do in express terms, that the sub-tenancy in this case was created in the year 1957.

32. If that is a position, then we have to refer section 106 of the Transfer of Property Act. Section 106 creates a presumption in case of leases. In the absence of a contract or local law or usage to the contrary a lease of immoveable property for manufacturing or agricultural purposes shall be deemed to be a lease from year to year and 'for any other purposes shall be from month to month'. If, therefore, there is no contract of lease which fell within the purview of section 107 then the presumption in section 106 will be attracted. In the present case the lease created in favour of the defendants in the year 1957 will have to be held in accordance with the presumption under section 106, therefore, to be a monthly tenancy. That section raises a presumption as to the nature of the tenancy on the basis of the user. A lease of immoveable property for agricultural or manufacturing purposes is deemed to be from year to year and those for any other purposes are deemed to be from month to month. The consequence of the aforesaid discussion and position is that the defendant must be held to be monthly sub-tenants from the year 1957. I may point out that the plaintiffs have admitted that the defendants were monthly sub-lessees but do not say when that sub-lease commenced. In the circumstances they must be deemed to have admitted and excepted the position that the defendants were monthly sub-lessees from the year 1957.

33. If that is so, then it is quite clear that in a case of monthly tenancy, there is no fixed period. A monthly tenancy is a periodic tenancy and the nature of that tenancy was indicated in Utility Article Manufacturing Co. v. Raja Bhadur Motilal Bombay Mills : AIR1943Bom306 , Kania, J. who also delivered a judgment in the case observed. 'It is clear that such periodical tenancies do not come to an end by the efflux of time, for the simple reason that the time is not limited by the original lease itself'. The nature of such tenancy is that they are not for a fix term and can be said to be initially for two months and every commencement of a new period is an accretion to the old tenancy. This continues so long as the tenancy is continued and brought to an end only by a notice to quit.

34. In Ram Kumar Das v. Jagdish Chandra Deo, : [1952]1SCR269 , the Supreme Court observed that 'the tenancy created by implication of law in favour of the defendant should be held to be from month to month'. It also held that 'the stipulation as to payment of annual rent would no doubt raise a presumption that the tenancy was from year to year but being contained in an inoperative document could not come in the way of raising a presumption' under section 106. The plain consequences, therefore, of this decision would be that the presumption under section 106 could be and has to be raised in the present case and that it has to be held that the monthly tenancy commenced from the inception in the year 1957.

35. The difficulty in this case begins once, we come to the conclusion that the defendants' tenancy must be held to be a monthly tenancy in the present case. In the view which I have taken of the pleading of the parties and operation of the provisions of sections 106 and 107 of the Transfer of Property Act, it is not necessary for me to go into the question as to whether the leases are governed only by the Transfer of the

Property Act and goes out on the domain of contracts. It was urged that where a document operates as a transfer of interest in property such as a lease then it ceases to remain in the domain of contract and becomes a transfer to which the provisions of the T.P. Act alone are applicable. A number of decision were cited at the Bar in support and in opposition of this proposition. It do not propose to go into them and at this stage. Since the question which now belongs relevant is if this was a monthly sub-tenancy, whether it was property terminated. The learned Judge proceeded on the footing that the sub-tenancy was for fixed period, only. In the view which I have taken that the tenancy being monthly tenancy and which had commenced in 1957 cannot be for a fixed period, this basis of the judgment disappears. A monthly tenancy does not expire as said at the end of any term and as I have pointed from the above decision in Utility Article's case and Ram Kumar Das, case to be a tenancy for an indefinite period determinable only be a notice to quit. It is these questions which present some amount of difficulty in this case, and require a finding which I propose to call from the trial Court.

36. I have already pointed out that according to the defendants the lessors were Kanji and Meghji. The learned Judge did not decide that question. It was not found that this contention of the defendants was correct or otherwise. It would appear from the receipt Exh. 5. that the lessors were Meghji and Kanji 'trading in the name of Meghji Vijpar and Co.' It is not clear from this as to whether the lease was granted in favour of two individuals by the Port Trust or it was granted to firm Meghji Vijpar and Co. A question which would then further arise would be if these two persons were the lessees, they had assigned their interest in favour of the firm, M/s. Meghji Vijpar & Co. so as to make the lease hold obtained by them from Port Trust that of the firm. It would also be a question as to whether the defendants had accepted that position. The positions taken by the parties in this behalf are conflicting and as I have pointed out there is a similar conflict in their pleadings about their nature of sub-tenancy. Expression 'trading in the name' may also be a description of Kanji and Meghji, there is no evidence and inquiry into this matter.

37. This question assumes important since a monthly sub-tenancy has to be determined by a notice to quit. A notice to quit is necessary to lend the plaintiffs-landlords a cause of action to file a suit against their tenant or ex-tenant. The right to sue does not accrue unless the tenancy is determined. This, I think is quite clear from the decision to which I shall only make a reference Nandlal Girdharilal v. Gulamnabi PamalBhai 1972 All I R C J 889, Full Bench, Gujarat High Court.'; Gholam Mohiuddin Hossien v. Khairan I.L.R. (1904) Cal 786; Gopal Ram Mouri v. Dhakeswar Parshad Narain Singh I.L.R. (1908) Cal 807; Banarashi Lal Laroiya v. Jatadhari Das : AIR1971Pat110 ; Ganoo v. Dev Shiddeshwar I.L.R. (1902) Bom 360 it was observed that 'the plaintiff when he files his suit must alleged to cause of action in the manner prescribed in section 50, and must prove the necessary allegations in so far as they are not admitted by the defendant'. Cause of action to the suit for possession against a monthly tenant is determination of his tenancy. Maganlal Dulabhdas v. Budhar Purshottam A.I.R. 1927 Bom 192 it was pointed that though the rule is that the termination must be by all co-owners the suit can be maintained by one of the co-owners against the trespasser-tenant. A monthly sub-tenant when tenancy is determined by a notice to quit is not a tenant at sufferance.

38. Since, in the present case there is no finding who were the lessors in the year 1957 and since there is also no further finding as to whether the lease in this case was properly and validly determined so as to give a cause of action to the plaintiffs,

these two questions must be remitted to the learned trial Judge for recording a finding thereon and remitting these findings to this Court. It is only when the findings are received on these two questions that the appeal can be finally disposed of.

39. Hence the order. Writ and R and P be sent to the City Civil Court for recording a finding on the question as to who were lessors of the defendants whose monthly tenancy commenced in the year 1957 and whether that tenancy is legally and validly determined. The findings to be certified within a period of three months.